85-1492

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID A. TOWNSEND, ESQ.
100 E. Madison Street, Suite 301
Tampa, Florida 33602
813/228-0148
Attorney for Borg-Warner Leasing

QUESTIONS PRESENTED

1. Whether Florida law mandates the waiver of an issue raised for the first time on a second appeal brought after a remand and trial.

2. Whether justifiable reliance is a necessary element of proof of fraudulent misrepresentation under Florida law.

LIST OF INTERESTED PARTIES

BORG-WARNER ACCEPTANCE CORPORATION
BORG-WARNER LEASING
DOYLE ELECTRIC COMPANY, INC.
P.H. DOYLE, JR.

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the United States District Court for the Middle District of Florida, William J. Castagna, J., are not reported. The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 733 F.2d 833 (App 3). The Jury Verdict and Final Judgment (App 4) of the United States District Court for the Middle District of Florida, William J. Castagna, J., of the case on remand are not reported.

The Petitioner's Motion For Judgment Non Obstante Veredicto (App 5) was denied by Order of the United States District Court for the Middle District of Florida (App 6).

The decision made by the Eleventh Circuit is cited at 767 F.2d 936 (5th Cir. 1985). The opinion is unpublished but appears herein at (App 7).

JURISDICTION

This petition seeks the discretionary jurisdiction of this Court pursuant to Rule 17 of the Supreme Court Rules of Appellate Procedure.

The Eleventh Circuit ruling below is in conflict with decisions by the Supreme Courts of Florida and Arizona and has reached a result which jeopardizes the sanctity of written contracts universally recognized under American jurisprudence.

STATEMENT OF THE CASE

Borg-Warner Leasing (hereinafter referred to as BW) filed a complaint in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida against Doyle Electric Company, Inc. (hereinafter referred to as DE) and P.H. Doyle, Jr. (hereinafter referred to as Doyle) seeking damages pursuant to a lease agreement between BW and DE and seeking recourse under a Guarantee Agreement executed by Doyle. The Defendants DE and Doyle joined a third party defendant, Burroughs Corporation, which filed a Petition for Removal based upon diversity jurisdiction on May 28, 1981 (R 6). The third party complaint was dismissed as was Burroughs Corporation as a party to this action.

BW filed an amended complaint (R 86).

The Defendants filed an answer, affirmative defenses and a counterclaim (R 62-70). BW filed motions for summary judgment addressed to the Defendant's counterclaim and to its claims against the Defendants (R 140-164). The Defendants filed a counter motion for summary judgment (R 170-181).

On April 1, 1983 the District Court entered its Opinion and Order which granted BW's motion for summary judgment and denied Defendants' motion for summary judgment on its counterclaim (App 1; R 228-234). On May 19, 1983 the District Court entered a Final Summary Judgment in favor of BW (App 2; R 228-234).

An appeal was taken to the Eleventh Circuit Court of Appeals by DE and Doyle. The appeals court affirmed the summary judgment as to Count I of BW's complaint against DE as well as the trial court's disposition of the Defendants' counter-

claim. The appellate court reversed the summary judgment on Count II of BW's complaint and remanded it for trial (App 3; R 305-309).

On October 11, 1984 through October 12, 1984, issues of fact concerning Doyle's personal liability pursuant to a personal guarantee agreement were tried before a jury. BW moved for a directed verdict based upon Doyle's admission that he had never read the guarantee agreement (TR 1-63). BW argued that there could be no justifiable reliance upon any misrepresentation as a matter of law. The motion was denied and the jury entered a verdict for Doyle (App 4). BW moved for a judgment N.O.V. (App 5; R 381) which was denied and final judgment in favor of Doyle was entered on November 1, 1984 (App 6; R 390). BW appealed the decision to the Eleventh Circuit. The Eleventh Circuit

refused to consider the substantive issue on its merits and ruled that BW's point on appeal should have been raised in the previous appeal (App 7).

BW filed a petition for rehearing which was denied on September 23, 1985.

SUMMARY OF ARGUMENT

I. Doyle has thus far managed to escape liability under a personal guarantee agreement by asserting that he was fraudulently induced into executing the document by an agent of BW. Doyle admitted for the first time at the trial mandated by the Eleventh Circuit's reversal and remand of Count II of BW's complaint that he had never read the personal guarantee agreement which was being sued upon.

II. BW argued that the essential element of proof required in Doyle's defense, that of justifiable reliance, could not have been met as a matter of law if he did not even bother to read the guarantee agreement he signed. The trial court refused to accept this argument on BW's

motion for directed verdict but did instruct the jury that justifiable reliance must be present before a verdict can be entered for the Defendant.

III. The trial court's denial of the motion for directed verdict and of the motion for a judgment N.O.V. was raised on appeal to the Eleventh Circuit citing a case by the Arizona Supreme Court which was virtually identical to the factual situation raised on appeal to the Eleventh Circuit.

IV. The Eleventh Circuit failed to consider the case on its merits but rather ruled on the theory of the law of the case, i.e., that the issue raised by BW should have been raised in the first appeal. Florida law mandates that the law of the

case is only applicable to issues which have not been previously raised, but even more importantly, the issue which the Eleventh Circuit has ruled should have been raised was, in fact, not possible to raise as of the time of the first appeal.

V. The issue at stake is one of great import. The longstanding esteem in which English common law and American jurisprudence have held the sanctity of contracts will be seriously eroded if this case is not disposed of on its merits and in accordance with the authority set forth in Jones v. Chiado Corporation, 137 Ariz. 298, 670 P.2d 403, (Ariz. Ct. App. 1983).

ARGUMENT

I. THE LAW OF THE CASE UNDER FLORIDA DECISIONS:

The most current ruling by the Supreme Court of Florida on what constitutes the law of the case is found in U.S. Concrete Pipe Company vs. Bauld, 437 So.2d 1061 (Fla. 1983).

The Eleventh Circuit opined that the issue of justifiable reliance should have been raised in the first appeal. This is not consistent with the holding of U.S. Concrete Pipe Company, supra. This case establishes that under Florida law the law of the case is applicable only to those issues which were actually raised in the prior appeal.

Furthermore, it is in conflict with the

5th U.S. Circuit Court of Appeal decision in 1955 in Johnson v. Remy, 220 F.2d 73, 78 (5th Cir. 1955) holding that the Federal Court will follow the latest Florida Supreme Court ruling where decisions are in conflict, but do not purport to overrule each other.

II. THE ELEVENTH CIRCUIT MISAPPREHENDED THE STATE OF THE RECORD AT THE TIME THE FIRST APPEAL WAS BROUGHT.

In its second decision, the appellate court opined that the issue raised therein should have been raised in the first appeal. However, the record will show that the admission made by Mr. Doyle that he had never signed the document he claimed was misrepresented to him was not made until during the trial following the remand by

the circuit court in the first appeal. If that admission did not exist in the record prior to the first appeal, it was simply not possible for BW to raise the issue the first time around. The non-existence of evidence in the record on this point as of the first appeal lends wisdom to the appellate court's remand of Count II for trial, but in its second opinion, the court is saying that the facts that were adduced at the trial and issues raised during the course of the trial should all have been available prior to the motion for summary judgment prior to the first appeal. This ruling is not consistent with Florida law, sound logic or any precept of justice.

III. THE APPELLATE COURT HAS PROCE-

DURALLY AND ERRONEOUSLY BY-PASSED A SUBSTANTIVE ISSUE OF GREAT IMPORT.

Doyle defended against BW's claim brought upon a personal guarantee by alleging fraudulent misrepresentation. This affirmative defense, under Florida law, requires affirmative proof of four elements: (1) a misrepresentation of material facts; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and, (4) consequent injury by a party acting in reliance upon the representation.

The Supreme Court of Florida has dealt with the issue of reliance that is addressed in the fourth element most recently in Bessett vs. Basnett, 389 So.2d 995 (Fla. 1980). In that decision, the

court adopted the principles of law expressed in sections 540 and 541 of the Restatement (Second) of Torts, (1976).

Section 540 reads as follows:

> The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.

Section 541 reads as follows:

> The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false of its falsity is obvious to him.

The Bessett Court also adopted the comments to the above-quoted sections. Comment "a" to section 541 is particularly instructive in the context of the instant case. That comment reads:

> a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his

> senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

Thus, when the Bessett Court stated that a recipient of a misrepresentation may rely on the truth of it unless he "knew it was false or its falsity is obvious to him", it meant unless he could have discovered the falsity by the slightest "examination or investigation." Florida law clearly requires a misrepresentee to investigate or examine that which is right

in front of his face.

IV. DOYLE'S ACTIONS DO NOT LEGALLY JUSTIFY AN AVOIDANCE OF LIABILITY UNDER A WRITTEN CONTRACT.

During the course of the trial, Doyle admitted that he had the personal guarantee in front of him and could have read it but did not and instead relied upon what the alleged agent of BW had represented to him about its application, i.e. that it was solely prospective in application. When the pertinent language of the personal guarantee was read to Mr. Doyle at trial he admitted that the language of the personal guarantee agreement did not limit its application to being prospective only.

Consequently, at the close of Doyle's case, BW moved for directed verdict which

was denied by the trial judge. The jury was instructed that it must find the Defendant's reliance to have been justifiable. Nevertheless, the jury returned a verdict for the Defendant, and the Plaintiff moved for judgment notwithstanding the verdict which was denied by the trial court without opinion.

An appeal to the Eleventh Circuit followed. It relied primarily upon an Arizona Supreme Court decision with a factual scenario virtually identical to this case, and its application would have required an opposite result by the appellate court. Jones v. Chiado Corporation, 137 Ariz. 298, 670 P.2d 403, (1983). See also: Marshall v. Hartman, 139 So. 441 (Fla. 1932). The appellate court instead disposed of the BW appeal on a procedural basis which was also contrary to applicable

law as previously argued.

V. THE FAILURE OF THE APPELLATE COURT TO CONSIDER THE SUBSTANTIVE ISSUE IN THIS CASE ERODES THE LONG STANDING SANCTITY OF WRITTEN CONTRACTS IN AMERICAN JURISPRUDENCE

It has long been the law in the State of Florida as well as all other jurisdictions adopting the common law inherited from England that it is presumed that when one signs a contract he knows and understands its contents, terms and conditions. Sabin v. Lowes of Florida, Inc., 404 So.2d 772 (Fla. 5th D.C.A 1981).

In the instant case the jury obviously failed to apply the instruction it was given which read:

> "Fourth, the Defendant must prove that he justifiably relied and acted upon the misrepresentations. If, in the exercise of reasonable care of the pro-

> tection of his own interests, the Defendant could have ascertained the truth of the matter by making a reasonable inquiry or investigation under the circumstances presented, but failed to do so, then it cannot be said that he "justifiably" relied upon such misrepresentations."

The error was not corrected by the trial court and ignored by the appellate court. The result is that a party has managed to avoid being bound by a written contract merely by not having read it, a result clearly not sanctioned by the Supreme Court of Arizona which dealt with the issue on a substantive basis. The Arizona court reversed a jury verdict finding no basis in the record for justifiable reliance.

To the ultimate court of the land, it should be a matter of great concern that, as a result of a compounding of errors, a decision has been allowed to stand which erodes the sanctity of the written contract. If potential litigants are given an

cpportunity to avoid the obligation of a contract by merely denying that they have read it and then invoking parol evidence in an attempt to prove misrepresentation and inducement the court is then inviting a flood of litigation which, prior to the decision of the appellate court in this case, the law clearly did not intend to condone and which is clearly not in the best interest of an already strained legal system.

Respectfully Submitted,

DAVID A. TOWNSEND, ESQ.
100 E. Madison Street
Suite 301
Tampa, Florida 33602
813/228-0148

CERTIFICATE OF SERVICE

All parties required to be served have been served by depositing on this 14th day of February, 1986, three printed copies of this document with the U.S. Post Office, addressed to counsel of record at his post office address.

Richard A. Nielsen, Esq.
RICHARD J. SALEM, P.A.
Post Office Box 3399
Tampa, Florida 33601
Counsel for Respondent,
Doyle Electric Company and
P.H. Doyle

DAVID A. TOWNSEND, ESQ.
Counsel of Record
Applicant, United States
Supreme Court Bar
100 E. Madison Street
Suite 301
Tampa, Florida 33601
(813) 228-0148

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

DAVID A. TOWNSEND, ESQ.
100 E. Madison Street, Suite 301
Tampa, Florida 33602
813/228-0148
Attorney for Borg-Warner Leasing

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.

Plaintiff,

vs. CASE NO. 81-500
Civ-T-WC

DOYLE ELECTRIC COMPANY, INC.
et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on Plaintiff's Motions for Summary Judgment on the Complaints and Counterclaim and Defendants' Motion for Summary Judgment on Count I of the Counterclaim. The Court heard argument of the parties on March 18, 1983. Subsequent to the hearing Plaintiff submitted the Affidavit of Donald D. Cookson in support of its motions and Defendants filed a memorandum in reply to that Affidavit.

This case concerns the obligations of Defendant Doyle Electric Co. to make payments on an equipment lease to Plaintiff Borg-Warner Leasing and the obligation of Defendant P.H. Doyle, Jr. under a guaranty agreement allegedly executed in connection with the lease transaction. The lease, signed by Doyle on October 17, 1978, essentially was a means for Doyle Electric to finance the purchase of a Burroughs computer. Doyle and Burroughs agreed that Burroughs would sell the computer equipment to Borg, which in turn would lease the equipment to Doyle and assign all of Burroughs' warranties to Doyle. Because the computer was allegedly defective, Doyle ceased making lease payments in September, 1979 but retained the equipment. Borg-Warner brought suit against Doyle Electric for breach of the lease agreement and against P.H. Doyle, Jr. for breach of the personal guaranty.

The Court concludes that, under Rule 56(c), Federal Rules of Civil Procedure, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact" and that Plaintiff is entitled to Summary Judgment as a matter of law on all claims.

As to Count I of the main claim, the corporate Defendant has admitted to executing the lease agreement and has also admitted breaching the lease agreement by failure to make payments due and owing from September, 1979. Therefore, no genuine issue of material fact remains as to the corporate defendant's liability for breach of the lease agreement. Although Defendant urges in Count I of the Counterclaim that the lease agreement should be rescinded

because it attempts to disclaim all express and implied warranties and thus is a contract of adhesion, void as unconscionable, the Court finds this claim totally without merit. Defendants' contention that Borg-Warner breached the contract by failing to provide suitable equipment for Defendants' needs is likewise without merit. As clearly evident from the lease agreement, Borg-Warner's contractual duty was to lease Defendants equipment that Defendants had chosen; nothing in the record suggests that Plaintiff owed Defendants a duty to choose or provide equipment appropriate for Defendants' needs.

Counts II and III of the Counterclaim are based on Defendants' contentions that the lease was in fact a sale and that Borg-Warner breached implied warranties of merchantability and of fitness for a parti-

cular purpose. Even assuming the transaction was a sale rather than a lease, these arguments would fail. First, the contract itself imposed no duty upon Plaintiff to choose equipment of any kind for Defendant. Thus, Plaintiff could in no way have warranted that equipment it sold was fit for any particular purpose, especially since nothing in the record suggests that the Defendants relied on Plaintiff's skill and judgment in choosing the equipment. Second, as Plaintiff points out, the issues of whether the transaction was a sale or a lease and whether Plaintiff has breached its implied warranty of merchantability are rendered moot by Plaintiff's legally effective disclaimer appearing on the face of the contract. Earman Oil Co. v. Burroughs Corporation, 625 F.2d 1291 (5th Cir. 1980). Thus, any possible issues concern-

ing whether the transaction was a sale or a lease and the applicable warranties arising simply are not "genuine issues of material fact."

At the hearing on this matter the primary issue presented was the legal effect of the personal guaranty agreement, the subject of Count II of the Complaint. The Court has examined the record and finds as a matter of law that Frank T. Myers was not an agent of Borg-Warner. Mr. Myers testified in his deposition that he was a leasing broker whose job was to set up financing for customers. In this case Burroughs, from whom Doyle wished to obtain the equipment, contacted Myers and asked him to contact Doyle. Defendants can point to nothing in the record to suggest that Mr. Myers' position was one on which Mr. Doyle could have or should have relied as a

representative of Borg-Warner. No representations by Myers to Doyle could bind Borg-Warner, and therefore Doyle's defenses of fraudulent misrepresentation and duress as to the Count II claim on the personal guaranty agreement are legally insufficient.

Defendants contend that there exists a genuine issue of material fact as to whether Mr. Doyle received any consideration for signing the guaranty and waiver agreement. They argue that Mr. Myers represented to Mr. Doyle that the guaranty agreement did not apply to the lease transaction that is the subject of this litigation but instead was applicable to future transactions. The guaranty agreement contains no such limitations and Mr. Myers testified to the contrary in his deposition. He stated that he told Mr. Doyle that Borg-Warner simply would not accept

the lease agreement without Mr. Doyle's signature on the guaranty agreement. Although these statements by Mr. Myers and Mr. Doyle are in direct conflict, they do not create an issue of material fact because Mr. Myers' statements could not legally bind Borg-Warner or affect the terms of its written agreement with Doyle.

Defendants also contend that, because there was an apparent discrepancy of one week between Plaintiff's signing of the lease and signing of the guaranty, Mr. Doyle received no consideration for the guaranty. In Florida, "the law is clear that where the promise of a guarantor is shown to have been given as part of a transaction that included the creation of the guaranteed obligation, the consideration supporting the obligation will also support the contract of guaranty." Von

Dunser v. Southeast First National Bank of Miami, 367 So.2d 1094, 1095 (Fla. 3rd DCA 1979). Defendants essentially contend that the dates on the face of the lease and guaranty agreements establish that the documents were not executed as part of one transaction, so the consideration given for the lease could not legally suffice as consideration for the guaranty. Although the lease is dated October 17, 1978 and the testimony of Mr. Doyle is unrebutted that he signed the lease on that date, the only testimony in the record concerning when Borg-Warner's representative signed and thereby accepted the lease is that of Donald D. Cookson, Borg-Warner's Branch Manager. In an Affidavit Mr. Cookson stated that the Assistant Manager of his office did not approve all of the supplementary documents or accept the lease until

November 2, 1978. In an earlier answer to an interrogatory Mr. Cookson had stated that the lease "application was subsequently processed and ultimately accepted on October 24, 1978." Although there is some discrepancy from Mr. Cookson's testimony as to the date of the acceptance, that discrepancy is not material because the only reasonable inference that can be drawn from both statements is that the lease was not accepted before October 24, 1978, the date on which Mr. Doyle signed the guaranty agreement. Defendants have pointed to nothing in the record that would cause the Court to conclude anything other than that the lease was signed and accepted on or after the date Mr. Doyle signed the guaranty agreement and therefore both documents were executed as part of a single transaction. The Court concludes as a matter of

law that there existed legally sufficient consideration for Mr. Doyle's signature on the guaranty agreement and Plaintiff is entitled to Summary Judgment on Count II of the Complaint. It is, therefore,

ORDERED:

1. Plaintiff's Motions for Summary Judgment on the Complaint and the Counterclaim will be granted.

2. Defendants' Motion for Summary Judgment on Count I of the Counterclaim is denied.

3. Summary Final Judgment will be entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle, Jr.

4. Plaintiff shall file with the Court, within twenty days of the date of this Order, affidavits as to the total sums currently due to Plaintiff under the lease

and guaranty agreement executed by Defendants. If the Defendants do not agree with the amounts set forth in Plaintiff's affidavits, Defendants shall, within twenty days and without prejudice to their right of appeal, file counter-affidavits setting forth their calculations of the amounts due Plaintiff under the lease.

5. This cause is removed from the trial calendar.

DONE AND ORDERED at Tampa, Florida this 1st day of April, 1983.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.

Plaintiff,

vs. CASE NO. 81-500
Civ-T-WC

DOYLE ELECTRIC COMPANY, INC., et al.,

Defendants.

FINAL SUMMARY JUDGMENT

The Court, having entered its Opinion and Order on April 1, 1983 directing that Summary Judgment would be entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle, Jr., now has for consideration the Plaintiff's Affidavit in Support of Final Summary Judgment, Defendants' Reply to Affidavit in Support of Final Summary Judgment, and Plaintiff's Response to Defendants' Response.

The parties do not dispute the following calculations:

Forty-eight unpaid monthly lease payments at $874.66 each	$41,983.68
Property taxes under the terms of the lease	1,451.10
Late charges in accordance with the terms of the lease	3,371.14

At dispute are two additional items. Plaintiff claims that it was able to give Defendants a reduced rate on the lease by passing through the Defendants a savings in the amount of an investment tax credit. After Defendants fell behind in their payments, however, Plaintiff had to write off the lease and thereby lost the benefit of the investment tax credit. This amount was $4,930.74. Plaintiff claims that it is now entitled to assess this amount as an item of damage against Defendants under para-

graph 7 of the lease, which provides that "Lessee shall pay all charges and local, state and Federal taxes (and reimburse Lessor for any such payments made by Lessor)." That paragraph states that Defendant is liable to Plaintiff for taxes paid; subsequent loss of a tax credit cannot be construed as a "tax paid." Therefore, the Court finds that the lease agreement does not obligate Defendants to pay for the Plaintiff's claimed lost tax credit.

Also disputed is the amount of rental tax due. The Court has examined the calculations submitted by both parties and finds that Plaintiff, in its Response to Defendants' Reply, has correctly calculated this amount. Thirty-two payments were taxable at the prior 4% rate. In 1982, Section 212.05, Florida Statutes, was amended. Transactions occurring after May

1, 1982 are taxable at the 5% rate. Therefore, 16 payments due after May 24, 1982 are taxable at 5%. The total rental tax due is:

4% on each of 32 unpaid payments of $874.66	$1,119.56
5% on each of 16 unpaid payments of $874.66	699.73
	$1,819.29

The total amount of damages due Plaintiff from Defendant is $48,625.21.

Therefore, it is

ORDERED:

1. Final Summary Judgment is entered in favor of Plaintiff Borg-Warner Leasing and against Defendants Doyle Electric Company, Inc. and P.H. Doyle in the amount of $48,625.21, together with costs, for all of which sums let execution issue.

DATED at Tampa, Florida this 19th day of May, 1983.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3501

BORG-WARNER LEASING, a Division of
BORG-WARNER ACCEPTANCE CORPORATION,
a Delaware Corporation,

Plaintiff-Appellee,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida
corporation and P.H. DOYLE, JR.,

Defendants-Appellants.

Appeal from the United States District
Court for the
Middle District of Florida

(June 4, 1984)

Before FAY, VANCE and HATCHETT,
Circuit Judges.

VANCE, Circuit Judge:

In this Florida diversity action the Doyle Electric Company and P.H. Doyle, Jr., its president, challenge the district court's grant of summary judgment for Borg-Warner Leasing(1). We affirm as to Doyle Electric and reverse as to Doyle.

In 1978 Doyle contacted the Burroughs Corporation on behalf of his company with an eye to obtaining a Burroughs B-80 computer. Preferring a lease to outright purchase, Doyle arranged to have Burroughs sell the computer to Borg-Warner, which in turn contracted to lease the equipment to

1. Throughout this opinion we shall refer to the company as "Doyle Electric", to its president as "Doyle", and to Borg-Warner Leasing as "Borg-Warner".

Doyle Electric with an option to purchase. The computer was installed but never functioned properly, prompting Doyle Electric to suspend lease payments. Borg-Warner in turn sued the company for breach of contract. Later Borg-Warner added Doyle as a party defendant based on a personal guaranty he had executed. Doyle Electric counterclaimed for rescission and cancellation due to failure of consideration and unconscionability. The court below entered summary judgment for Borg-Warner on both the original claims and the counterclaim. This appeal followed.(2)

2. Borg-Warner, a Delaware corporation, originally sued Doyle and Doyle Electric, both Florida citizens, in Florida state court. Doyle Electric proceeded to file a third party claim for indemnity against Burroughs, a Massachusetts corporation. Burroughs successfully petitioned for removal of the entire case on the basis of diversity. The federal district court later

dismissed the claim against Burroughs for failure to state a claim for indemnity.

We note that Borg-Warner's initial claims against Doyle and Doyle Electric were not removable because those defendants were citizens of the state in which the action was brought. 28 U.S.C. sec. 1441(b). The third party claim against Burroughs would have been removable if sued upon alone. Under 28 U.S.C. sec. 1441(c), removal of the entire case was proper only if the impleaded claim was separate and independent of the original action.

This case raises a serious question whether the indemnity claim against Burroughs was separate and independent of the original contract claims so as to warrant their removal. See 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure sec. 3724, at 645-46 (1976); 1A J. Moore & B. Ringle, Moore's Federal Practice, paras. 0.163[4.-6], 0.167[10] (1983). We do not believe that Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980), is dispositive because that case involved the propriety of removing a diverse third party indemnity claim which the federal district court had retained after remanding the original, nondiverse action. The panel in Carl Heck did not have to reach the more difficult question whether the original

Appellants raise two issues: (1) whether Doyle as a matter of law is liable on the personal guaranty; (2) whether the facts as a matter of law preclude the existence of failure of consideration and unconscionability.

We note initially that Borg-Warner, as the party seeking summary judgment, bore the burden of showing the absence of a

action itself would have been removable since the lower court had remanded the original action to state court. Nor need we address this issue since any error that occurred was a technical flaw that did not go to the subject matter juridsiction of the court. Because Borg-Warner's action fell within the original diversity jurisdiction of the federal district court, the procedural defect under the removal statute was waivable by the parties. Monroe v. United Carbon Co., 196 F.2d 455 (5th Cir. 1952); see Grubbs v. General Electric Credit Corp., 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). We conclude that waiver occurred since this case proceeded without objection to consideration on the merits.

genuine issue as to any material fact. For purposes of review we must consider the facts as adduced in the affidavits, admissions, and deposition excerpts submitted in connection with the summary judgment motion in the light most favorable to the opposing party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). With these principles in mind, we turn to the effectiveness of the personal guaranty.

Once Doyle selected the computer that seemed best suited to his company's needs, Burroughs agreed to locate someone who could arrange a lease. Soon afterward Doyle heard from Frank T. Myers, a leasing broker. Myers first interviewed Doyle to determine Doyle Electric's requirements. He then broached the matter of a lease with Borg-Warner. Borg-Warner, which was agree-

able, prepared a purchase option and a standardized lease agreement imprinted with the Borg-Warner name for signature by Doyle Electric. It also drew up a personal guaranty for Doyle to sign in his individual capacity. Borg-Warner instructed Myers to present the documents to Doyle for signature. Doyle signed the lease on behalf of Doyle Electric on October 17, 1978. Myers' attempts to persuade Doyle to guarantee the lease in his individual capacity, however, met with adamant refusal.

The Computer was installed two days later, on October 19. On October 24 Myers renewed his efforts to persuade Doyle to sign the guaranty. Doyle finally agreed to do so. In a subsequent affidavit Doyle stated that he signed only because Myers assured him that the guaranty would have solely prospective effect and that it thus

would not relate back to the October 17 lease. Myers gave a different account in deposition. According to the broker, he told Doyle that Borg-Warner would not sign the lease unless Doyle gave his personal guaranty. The guaranty itself is silent. Borg-Warner executed the lease shortly after Doyle acceded to Myers' requests.

Myers was an independent broker, as Doyle realized by the time he signed the guaranty. As a broker, Myers served as a conduit to a number of competing computer leasing firms. One such firm was Borg-Warner. In the negotiations that culminated in the guaranty Doyle dealt exclusively with Myers and thus had no direct contact with the leasing company. Borg-Warner later paid Myers a finder's fee for his services.

Doyle raised fraud in the inducement as one of his defenses to liability on the personal guaranty. On appeal he argues that summary judgment was improper because the facts regarding the effect of the guaranty remain in dispute. To reach this contention, however, we must first conclude that a genuine issue of material fact exists as to whether Myers was Borg-Warner's agent for the purpose of any representations that might have been made.

The trial cout discerned no evidence that Myers was Borg-Warner's agent with authority to bind that company. Our examination of the Florida law governing agency, which controls this diversity case, compels a different conclusion. Under Florida law, actual authority is not necessarily a precondition of an agency relationship. Under the doctrine of apparent authority, an

agency will arise when the principal allows or causes others to believe that an individual has authority to conduct the act in question, inducing their detrimental reliance. Fidelity & Casualty Co. v. D.N. Morrison Construction Co., 116 Fla. 66, 156 So. 385, 387 (1934); City National Bank v. Basic Food Industries, Inc., 520 F.2d 336, 337 (5th Cir.1975). Contrary to Borg-Warner's contentions, apparent agency can arise even in the face of the principal's silence when the principal by its actions creates a reasonable appearance of authority. See, e.g., Stiles v. Gordon Land Co., 44 So.2d 417, 421-22 (Fla.1950).

Under Floria case law, a question of agency is reserved to the trier of fact when resolution of the issue depends on the inferences to be drawn from the facts adduced. Amerven, Inc. v. Abbadie, 238

So.2d 321, 322 (3d Fla.App.1970); see also Adickes, 398 U.S. at 158-59, 90 S.Ct. at 1608-09. We conclude that this is such a case. Borg-Warner entrusted Myers with forms bearing the Borg-Warner imprint and instructed him to obtain Doyle's approval. Throughout the contract negotiations Myers was Doyle's sole point of contact with the company. Borg-Warner does not deny that it vested Myers with aughority to persuade Doyle to sign the guaranty. Although Borg-Warner never informed Doyle that Myers was its agent, a trier of fact could reasonably conclude Borg-Warner gave that impression by appointing Myers as the bearer of its letterhead documents and as the exclusive negotiator of its demands. See Lumbermens Mutual Casualty Co. v Savigliano, 422 So.2d 29, 31 (4th Fla.App. 1982); Russell v. Eckert, 195 So.2d 617,

621-22 (2d Fla.App. 1967). That Doyle knew Myers was an independent broker does not alter the outcome. A broker can become an agent when the principal creates the reasonable appearance of authority. Montone v. Bush, 167 So.2d 884 (2d Fla.App.1964).

In response, Borg-Warner argues that, even if the facts support a finding of agency, Doyle's defense must fail because the record contains no evidence that Doyle relied to his detriment on Myers' alleged representations. Doyle testified, however, that he agreed to sign the guaranty only because Myers promised that Borg-Warner would apply the guaranty solely to future business dealings and not to the lease at hand. This testimony sufficed to create an issue of fact with respect to reliance.

We conclude that the question whether Myers was Borg-Warner's agent for purposes of the guaranty raises a genuine issue of material fact not amenable to summary judgment. Because a dispute thus remains as to the existence of an agency relationship and the promised effect of the guaranty, we reverse the trial court's order of summary judgment against Doyle and remand.

Doyle Electric's efforts to revive its counterclaim merit only brief discussion. Under the terms of the standardized lease agreement, Borg-Warner rented the computer "as is" and disclaimed all warranties, express and implied. Thus, Doyle Electric remained obligated to pay rent even though the computer failed to operate properly. Doyle Electric asserts that summary judgment was improper because the warranty disclaimers and the rent provision create

issues of fact whether failure of consideration or unconscionability warrant rescission of the lease.

For purposes of these arguments we see no functional difference between the purchase-option lease involved in this case and a direct purchase from a manufacturer financed by a mortgage. Doyle Electric ignores the fact that Borg-Warner, as the buyer, assigned its warranty rights against Burroughs, the seller, to Doyle Electric. Thus Doyle Electric had the contractual right to assert Borg-Warner's warranty rights against Burroughs. The assignment clause provided consideration for the rent obligation and preserved an adequate remedy for Doyle Electric, precluding unconscionability. It was Doyle Electric rather than Borg-Warner, moreover, who originally selected the computer that failed and who

therefore was better situated to understand its potential defects. Given these circumstances, we conclude that summary judgment was correct and therefore we affirm the judgment of the court below with respect to the counterclaim for rescission.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

BORG-WARNER LEASING, LTD., etc.

vs.

P.H. DOYLE, JR.

81-500-CIV-T-WC

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

/X/ JURY VERDICT. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

/ / DECISION BY COURT. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant, P.H. Doyle, Jr., recover of the Plaintiff, Borg-Warner Leasing, his costs of action.

CLERK: DONALD M. CINNAMOND/ DATE: 10/12/84

(BY) DEPUTY CLERK: /s/ B. Michael M. Lemore

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.	)	
Plaintiff,	)	
vs.	)	CASE # 81-500 CIV-T-WC
DOYLE ELECTRIC COMPANY, INC. and P.H. DOYLE, JR.,	)	
Defendants.	)	

MOTION FOR JUDGMENT
NON OBSTANTE VEREDICTO

COMES NOW, the Plaintiff, BORG-WARNER LEASING, by and through its undersigned counsel and pursuant to Fed.R.Civ.P. 50(b) moves the Court for entry of judgment in its favor not withstanding the verdict of the jury and in support thereof would show:

1. Plaintiff or Plaintiff's agent was alleged to have uttered a false statement regarding the import or effect of a personal guaranty agreement.

2. The said personal guaranty agreement was at Defendant, Doyle's immediate disposal at the time the alleged false statement was made which was also the same time that Doyle signed the guaranty agreement.

3. The written language of the guaranty was in direct and absolute contravention of the substance of the alleged false statement.

4. A necessary element of fraud is that the representee must justifiably rely on the false statement.

5. The jury in the present action found the false representation to have constituted fraud and by special verdict found Defendant Doyle's reliance justifiable.

6. That Defendant Doyle's reliance on the alleged false statement was unreason-

able is a fact upon which reasonable persons could not differ in view of the applicable Florida law.

WHEREFORE, Plaintiff BORG-WARNER LEASING hereby moves the Court for the entry of a Judgment Non Obstante Veredicto.

MEMORANDUM OF LAW

When testifying in the present action, Defendant, P.H. Doyle alleged two facts pertinent to this motion. First, Doyle stated that Mr. Myers told him that the guaranty agreement he was signing would only operate prospectively. Doyle then testified that he signed the guaranty agreement without reading its contents. The misrepresentation was allegedly made contemporaneously with the signing of the personal guaranty.

The evidence also demonstrated that the guaranty agreement contained the following wording in its first paragraph:

> "[Doyle] hereby absolutely guarantees the full and prompt payment of any and every indebtedness, liability or obligation; liability or obligation (howsoever arising and of any nature whatsoever), which may now or at anytime and from time to time hereafter exist or be incurred..."

This language is in direct contravention of Mr. Myers' alleged statement.

Doyle's sole defense at trial was that Mr. Myers was guilty of fraud by virtue of his representation regarding the guaranty agreement. Specifically, Doyle claimed that Mr. Myers' represented that the personal guaranty would only apply to future transactions. The jury agreed with this contention and found that the personal guaranty signed by Doyle was null and void. Among the specific findings of the

jury was an affirmative answer to the question: "Did the preponderance of the evidence demonstrate that Mr. Doyle justifiably relied on Mr. Myers' false representation of a material fact?"

Florida law is clear as to what does and what does not constitute justifiable reliance. In the case of Besett v. Basnett, 389 So.2d 995 (Fla. 1980) the Florida Supreme Court adopted Section 541 of the Restatement (Second) of Torts (1976) along with that section's comment. That section and comment reads as follows:

> The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.
> Comment:
> a. Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the maker's honesty by investigating its truth, he is nonetheless required to use his

> senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. Thus, if one induces another to buy a horse by representing it to be sound, the purchaser cannot recover even though the horse has but one eye, if the horse is shown to the purchaser before he buys it and the slightest inspection would have disclosed the defect. On the other hand, the rule stated in this Section applies only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by the use of his senses. Thus a defect that any experienced horseman would at once recognize at first glance may not be patent to a person who has had no experience with horses.

The jury instructions accurately reflected the law in this matter. The jury instruction on this point was as follows:

> "Fourth, the Defendant must prove that he justifiably relied and acted upon the misrepresentations. If, in the exercise of reasonable care for the protection of his own interest, the Defendant could have ascertained the truth of the matter by making a reasonable inquiry or investigation under the circumstances presented, but failed to

do so, then it cannot be said that he "justifiably" relied upon such misrepresentations."

As related above, Mr. Doyle testified that he did not read the guaranty agreement that he signed. The guaranty agreement directly contradicted the Myers' statement. Thus, Mr. Doyle had an opportunity to make a cursory examination that would have disclosed the falsity of Myers' statement but chose not to do so. This fact is not and cannot be contraverted. Obviously, since Doyle actually signed the guaranty agreement a cursory examination of it would have been quite easily performed. A cursory examination, in turn, could not have helped but uncover the falsity of Mr. Myers' statement.

In summation, Mr. Myers made a false statement to Doyle regarding the guaranty agreement. Mr. Doyle signed that same

agreement without reading it. On this the facts are clear and uncontroverted. This set of facts leaves no doubt that Mr. Doyle's reliance on Mr. Myers' statement was unjustified. Mr. Doyle's unjustified reliance is a fact upon which no reasonable person could differ. Thus, this Court should enter judgment in favor of the Plaintiff not withstanding the verdict of the jury. United States v. 329.73 Acres of Land, Etc., 666 F.2d 281 (5th Cir., 1982).

/s/ Paul E. Parrish
PAUL E. PARRISH
DAVID A. TOWNSEND, ESQ.
100 Madison Street
Suite 301
Tampa, Florida 33602
813/228-0148
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been sent by U.S. Mail this 18th day of October, 1984 to: RICK NEILSON, ESQ., P.O. Box 3399, Tampa, Florida 33601.

/s/ Paul Parrish
PAUL PARRISH
DAVID A. TOWNSEND, ESQ.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BORG-WARNER LEASING, etc.,

Plaintiff,

vs. Case No. 81-500-Civ-T-WC

DOYLE ELECTRIC COMPANY, INC., et al.,

Defendants.

O R D E R

The Court has before it the Plaintiff's Motion For Judgment Non Obstante Veredicto. Having considered that Motion and the Defendant's Response thereto, the Court finds no basis for granting the requested relief and the jury's verdict will not be disturbed. Accordingly, it is

ORDERED:

1. Plaintiff's Motion for Judgment Non Obstante Veredicto is denied.

DONE AND ORDERED at Tampa, Florida this 1st day of November, 1984.

/s/ WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-3797

BORG-WARNER LEASING, etc.

Plaintiff-Appellant,

versus

P.H. DOYLE, JR.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(June 27, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

Plaintiff/appellant Borg-Warner Leasing appeals from the district court's denial of its motions for directed verdict and judgment notwithstanding the verdict, contending that, as a matter of law, defendant-appellee Doyle could not have justifiably relied on an alleged representation as to the effect of a personal guaranty, which representation the jury found to be fraudulent. We do not reach these contentions, determining that the "law of the case" doctrine precludes our consideration of this argument.

"Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984)

(quoting United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982)); see Westbrook v. Zant, 743 F.2d 764, 768-69 (11th Cir. 1984). This doctrine encompasses both issues explicitly decided in the prior appeal, and issues decided by necessary implication. Wheeler, 746 F.2d at 1440.

In a prior appeal of this case we reversed a grant of summary judgment in favor of appellant, holding that a genuine issue of material fact remained "as to the existence of an agency relationship and the promised effect of the guaranty." Borg-Warner Leasing v. Doyle Electric Co., 733 F.2d 833, 836 (11th Cir. 1984). In so holding, we stated that:

> In response [to Doyle's contentions that Myers was an apparent agent of Borg-Warner], Borg-Warner argues that, even if the facts support a finding of agency, Doyle's defense must fail

> because the record contains no evidence that Doyle relied to his detriment on Myers' alleged representations. Doyle testified, however, that he agreed to sign the guaranty only because Myers promised that Borg-Warner would apply the guaranty solely to future business dealings and not to the lease at hand. This testimony sufficed to create an issue of fact with respect to reliance.

Id.

Our prior decision explicitly determined that the issue of whether Doyle relied on Myers' alleged representation was an issue of fact to be resolved by the jury. The jury has decided the issue in favor of Doyle. The "law of the case" doctrine now prevents us from reconsidering our prior conclusion and holding that Doyle could not have justifiably relied on the representation as a matter of law.

Appellant argues that the specific issue of what constitutes "justifiable reliance" was not argued in the initial appeal. The short answer to this argument

is that it is irrelevant, since the court explicitly found a genuine issue of material fact with regard to reliance. Furthermore, on the initial appeal the parties did debate whether Doyle had relied on any representations by Myers. See Brief of Appellee at 16-17, Borg-Warner Leasing, 733 F.2d 837. Borg-Warner could have and should have raised any arguments as to the legal sufficiency of Doyle's reliance on the representations during the initial appeal.

None of the exceptions to the application of the law of the case doctrine, see, Wheeler, 746 F.2d at 1440, exist here. The trial of the case did not present any new evidence as to the terms of the guaranty agreement or Doyle's testimony. There has been no change of law which would cause us to depart from the findings and conclusions in our initial determination, that the

question of Doyle's reliance raised a genuine issue of material fact, was clearly erroneous and would work a manifest injustice if not reconsidered.

The district court orders denying Borg-Warner's motions for directed verdict and judgment notwithstanding the verdict are

AFFIRMED.

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

CASE NO. 85-1492

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1985

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delaware Corporation,

Petitioner,

vs.

DOYLE ELECTRIC COMPANY, INC., a Florida corporation and P.H. DOYLE, JR.,

Respondent.

ON PETITION FOR CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. SALEM, ESQUIRE
Counsel of Record
RICHARD J. SALEM, P.A.
111 Parker St., Ste. 301
P.O. Box 3399
Tampa, Florida 33601
(813) 254-9000
Attorney for Doyle Electric Company, Inc.
and P.H. Doyle, Jr.

27pp

SUPREME COURT OF THE UNITED STATES OF AMERICA

BORG-WARNER LEASING, a division of Borg-Warner Acceptance Corporation, a Delware corporation,

Petitioner

vs.

DOYLE ELECTRIC COMPANY, INC. a Florida corporation and P.H. DOYLE, JR.,

Respondent.

_____/

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Parties to the Proceeding Below

1. BORG-WARNER LEASING: A sub-division of BORG-WARNER ACCEPTANCE CORPORATION

2. BORG-WARNER ACCEPTANCE CORPORATION: the parent company of BORG-WARNER LEASING

3. DOYLE ELECTRIC COMPANY, INC.

4. P.H. DOYLE, JR.

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References to Reports of Opinions Below

Respondent, P.H. Doyle, Jr., accepts the references to reports of opinions below filed by the Petitioner, Borg-Warner Leasing. References to the Appendix filed by the Petitioner are indicated by (App); references to the Record on Appeal are indicated by (R); and references to the Trial Transcript are indicated by (TR).

SUMMARY OF THE ARGUMENT

I. Certiorari should not be granted in this case since the Petition does not present any "special and important reasons" traditionally required for certiorari jurisdiction.

II. The Petition does not reveal any federal question in conflict with a state court of last resort. The Petition does argue the doctrine of "law of the case" which is governed by federal procedural law. However, the decision below is not in conflict with case law considering this doctrine.

III. The Eleventh Circuit properly decided that Florida law concerning reliance on fraudulent misrepresentations

was applicable in the instant case. Neither this decision nor the action of the trial court departed from the usual course of judicial proceedings necessitating this Court's intervention.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A DECISION IN CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

This Court should deny the Writ of Certiorari in this case since there are no special or important reasons for granting it. Rule 17, Rules of the Supreme Court of the United States provides an indication of the character of reasons that will be considered. These include a decision rendered by a federal court of appeals conflicting with the decision of another circuit court, a decision on a federal question in conflict with a state court of last resort or a decision which has departed

from or has permitted a departure by a lower court from the accepted and usual course of judicial proceedings so as to require intervention by this Court. Sup. Ct. R. 17. Also suggested as a reason in Rule 17 is a decision by a federal court of appeals on an important question of federal law either in conflict with decisions of this Court or which has not been, but should be, considered by this Court.

The Petition of Borg-Warner contends that the Eleventh Circuit Court of Appeals erred in its application of the doctrine of the "law of the case" and in failing to apply a decision of the Supreme Court of Arizona on the issue of fraudulent misrepresentation. Borg-Warner does not suggest that the Eleventh Circuit's application of the "law of the case" is

in conflict with that doctrine as applied in any other federal court of appeals. There is also no contention that another Circuit Court has decided the issue of justifiable reliance in a manner in conflict with the Eleventh Circuit's opinion in this case.

Although there are an abundance of cases in which this Court has granted certiorari to review decisions which have created "... a real and embarrassing conflict of opinion and authority between the circuit courts of appeal" Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1928), that is not argued and is not apparent in the case at bar. Since there has been no showing of decisional conflict, the Petition for Writ Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A FEDERAL QUESTION DECIDED IN CONFLICT WITH A STATE COURT OF LAST RESORT OR A DECISION OF THIS COURT, OR AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

No federal question has been raised by Borg-Warner in its Petition. For this reason no argument is made that a federal question has been decided in conflict with a decision of the state court of last resort. A "federal question" is defined as a matter which arises under the Constitution, law or treaties of the United States. 28 U.S.C. Section 1331. As stated earlier, Borg-Warner has contended in its Petition

that errors were made in application of the doctrine of the "law of the case" and in failing to apply Arizona decisional law. (App 26) Borg-Warner Leasing v. Doyle Electric Co., Inc., 733 F.2d 833, 836 (11th Cir. 1984). The issue raised by Borg-Warner as to what constitutes justifiable reliance sufficient to prove fraudulent misrepresentation does not rise to the level of a "federal question". In addition it is not a matter of federal law.

The doctrine of the "law of the case" is a matter of procedure in the federal court system and as such is governed by federal law. The doctrine has been reviewed by this Court on prior occasions and is well settled. When a case is appealed and remanded, the appellate court decision establishes what

is termed the "law of the case", and it must be followed by the trial court on remand. In addition, where the case is remanded and the trial court's judgment is appealed for the second time, the holding from the first appeal establishes the "law of the case" to be followed in the second. 1B Moore's Federal Practice. See also, Lehrman v. Gulf Oil Corporation, 500 F.2d 659, 662-63 (5th Cir. 1974).

Borg-Warner cites Johnson v. Remy 220 F.2d 73 (5th Cir. 1955), in support of its claim that the Eleventh Circuit should have applied Florida law with respect to the "law of the case" doctrine.

The Petitioner suggest that the case stands for the proposition that where decisions are in conflict, the latest Florida supreme court decision

controls. This is not a proper reading of the case. Remy holds that a ruling by the Supreme Court of Florida controls when there is a conflict on a question of purely state law. As was discussed above, the doctrine of the "law of the case" is a matter of procedure in the federal court system and not a question purely of state law. Therefore, federal authority is controlling.

The doctrine has been interpreted by the Eleventh Circuit as requiring that an appellate court's findings of fact and conclusions of law on appeal will be "generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." Westbrook v. Zant, 743 F.2d 764, 768 (11th Cir. 1984) (citing

Dorsey v. Continental Casualty Co., 730 F.2d 675, 678 (11th Cir. 1984)). The doctrine encompasses not only those things which have been determined explicitly but also all those which must necessarily have been determined by implication. Wheeler v. City of Pleasant Grove, 746 F.2d 1437, 1440 (11th Cir. 1984), citing Dickenson V. Auto Center Mfg. Co., 733 F.2d 1092, 1098 (5th Cir. 1983).

The first time this case appeared before the Eleventh Circuit the issue of reliance was at the very heart of the court's decision. In reversing the summary judgment the Eleventh Circuit had to decide, if only by implication, that the issue of facts with respect to reliance was material and that the defense of fraud in the

inducement was legally sufficient.

In the second opinion the Eleventh Circuit noted that the issue of justifiable reliance had properly been determined to be a jury question which was decided in Doyle's favor on remand. (App 48). Neither the trial court nor the appellate court can substitute its judgment for that of the jury. Griffin v. Swim-Tech Corp.,722 F.2d 677 (11th Cir. 1984). Once the determination was made by the Eleventh Circuit that the issue of reliance was a material fact for the jury's consideration, that court was barred by the "law of the case" from reconsidering the issue of of justifiable reliance and was bound by the jury decision on remand.

III. THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A DECISION SO FAR DEPARTING FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTIONING SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR THIS COURT'S SUPERVISION.

The decision of the Eleventh Circuit properly applied applicable law to the facts in the instant case and has not departed from the usual course of judicial proceedings or sanctioned such a departure by the trial court. The Eleventh Circuit correctly applied Florida law in affirming the jury verdict.

The contention by Borg-Warner that somehow Arizona law is applicable to this case is untenable. Borg-Warner searched American case law and was able to find one case that supported its

position. The case principally relied on by Borg-Warner is that of Jones v. Chiado Corp., 137 Ariz. 298, 670 P.2d 403 (1983). Other than the fact that the Jones case supports its position, Borg-Warner has presented no recognized basis for citing the Jones case as controlling. As is obvious from a review of the record, neither the parties nor the subject matter had any nexus with the state of Arizona.

The Eleventh Circuit properly determined during the initial appeal that this action was controlled by Florida law. Borg-Warner Leasing, 733 F.2d at 836. The most recent decision of the Florida supreme court dealing with the issue of reliance on fraudulent misrepresentations is the case of

Bessett v. Basnett, 389 So.2d 995 (Fla. 1980). The court adopted Sections 540 and 541 of the Restatement (2d) of Torts (1976), and in so doing eliminated the "investigation" requirement in fraudulent misrepresentation cases. Bessett v. Basnett, at 997.

The court stated in Bessett that:

> (A) person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the two-fraud and negligence-negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.

Id. at 998.

Although this is the most recent decision by the Supreme Court of Florida, other courts within the state have

interpreted the case. Most notably, in Davis v. Department of Health and Rehabilitative Services, 461 So.2d 210 (Fla. 1st DCA 1984) a situation comparable to that presented in the instant case was present. In that case a contractor participated in bidding on a contract to construct a building. Representatives of Health and Rehabilitative Services (HRS) informed the contractor that the building would be used from 8:00 a.m. to 5:00 p.m. Id. at 211. Once the contract had been awarded, HRS informed the contractor that the lease was being interpreted to require the building to be open and operating 24 hours a day, 365 days per year. HRS in turn told the contractor that he would be obligated to provide services during all hours of operation at no additional

cost.

The court relies on Bessett and states that although HRS argued that the contractor could not rely on a fraudulent misrepresentation where the contract was clear and unambiguous on its face, justifiable reliance had been established by Davis. The court noted:

> "Davis was told that the facility would be used from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays. He reasonably and justifiably relied on that information in preparing his bid. He had no duty to further inquire." Id. at 212.

Similarly, Doyle had no obligation to further inquire about the personal guaranty once he was told that it would not be applied to the lease signed by him at that time. This would be true even if he had entered

into a partial investigation by reading some but not all of the personal guaranty agreement.[1] See, Gold v. Perry, 456 So.2d 1197, 1201 (Fla. 4th DCA 1984).

[1] Petitioner has argued that Doyle admitted at trial, for the first time, that he had never read the personal guaranty agreement and that this issue was not presented to the Eleventh Circuit during the first appeal. (Petition at 12-13-). Failure to present the issue on the first appeal lies squarely with the Petitioner since the fact that Doyle had not read the lease documents was known by the Petitioner prior to entry of the summary judgment and was a part of the record at that time. Doyle admitted at his deposition taken on December 15, 1982, that he doubted that he had read through all the documents before signing them. (Deposition of Doyle, December 15, 1982, at 13). Doyle's deposition was filed and used in support of Petitioner's Motion for Summary Judgment.

CONCLUSION

This Court has previously noted that

> "it is very important that we be consistent in not granting the writ of certiorari except in case involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Layne and Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The principles of fraudulent misrepresentation are well settled under Florida law. There is no indication of any conflict between the circuit court of appeal on any of the issues considered and decided by the Eleventh Circuit, below. Since Borg-Warner has failed to raise any issue falling within

the character of reasons usually considered for the granting of a writ of certiorari, it is respectfully requested that the Petition be denied.

AFFIDAVIT OF SERVICE

RICHARD J. SALEM, being duly sworn, deposes and says:

On the 11th day of April, 1986, I deposited three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in a United States Post Office in Tampa, Florida with first class postage pre-paid to David A. Townsend, Esq., Counsel of Record, 100 E. Madison St., Suite 301, Tampa, Florida 33601.

/S/
Richard J. Salem

SWORN TO and subscribed before me this 11th day of April, 1986.

/S/
Notary Public

My Commission expires: